

The State of New Hampshire

original material
in 420.5

opinion

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August 1, 1974

Mr. Edward J. Powers
Executive Director
Sweepstakes Commission
125 North Main Street
Concord, New Hampshire 03301

Dear Mr. Powers:

In your letter of September 1, 1971, you posed several questions regarding sale of sweepstakes tickets at rest areas on "Interstate" highways. On September 22, 1971, we replied that the Commission had no authority to sell tickets at rest areas other than those specifically enumerated in RSA 284:21-h, II (supp), and that your question was thus hypothetical.

On September 27, 1971, you responded that it was your intention to introduce a bill at the next [1973] session of the Legislature which would permit the sale of tickets at highway rest areas in New Hampshire.

During the 1973 session, RSA 284:21-h, II (d) (supp) was amended (Ch. 484) to provide in pertinent part that tickets

[m]ay be sold by or for the sweepstakes commission at designated locations, other than grounds and campuses of public and private schools, colleges and universities, by persons, whether natural, associate or corporate, authorized to sell such tickets on a uniform five percent commission basis for services rendered, which sum shall be the sole compensation paid to the principal for such ticket selling.... [Emphasis added.]

The amendment was effective August 29, 1973.

August 1, 1974

On July 26, 1973, you renewed your request of September 1, 1971 for consideration in light of the new legislation. Considering the matter as a whole, we assume that your question as of now may be stated as whether the Sweepstakes Commission may, under applicable law and regulation, sell tickets at rest areas on New Hampshire highways.

The answer to that question depends, as a threshold matter, upon whether the 1973 legislation, above mentioned, authorizes the Commission to sell tickets at rest areas insofar as State law controls. We are of the opinion that it does.

At issue is the meaning of the phrase "designated locations" in the new Section 21-h, II (d), quoted above. Absent any specific mention in the statute of who shall have the power of designation, we do not hesitate to conclude that the power is in the Commission.

The scope of that power of designation, although subject to certain specific limitations in the text of the statute not material here, is not otherwise intrinsically limited. However, we are not able to say categorically that the power may not be subject to other extrinsic limitations under State law which have not yet surfaced in a factual context. Two possible limitations are raised by the questions now considered. The first is that expressed in RSA 236:8, which provides that

[n]o commercial enterprise or activities shall be authorized or conducted by the state commissioner of public works and highways or any other agency of the state within or on the property acquired for or designated as [a] limited access facility.

Also to be considered, however, is RSA 284:21-h, II (b), which provides that tickets

[m]ay be sold by the sweepstakes commission in the following locations: Branch offices of the commission, to be established at the information area adjacent to the Hampton toll station and the Hooksett toll station, and commission's office in Concord. Each branch office at the Hooksett and Hampton toll stations will be in a new building to be constructed by the department of public works and highways in accordance with their design and specifications. The sweepstakes commission is hereby authorized to contract with the department of public works and highways for the construction of these buildings, the cost of which

August 1, 1974

will be a charge against sweepstakes revenue. Tickets sold at any of the locations provided for by this subparagraph shall be sold only by sweepstakes commission employees or through automatic ticket dispensing machines.

This statute provides on its face for sales of tickets at two locations on limited access highways otherwise subject to RSA 236:8, and does so without cross-reference and exception, which strongly suggests that the Legislature does not consider the two provisions to be inconsistent. It is not necessary for the purposes of this opinion to decide whether that result follows from a determination that the sweepstakes operation is not generically a "commercial enterprise or activity", or that the operation, however commercial, is so obviously a proper exception from the restrictions of RSA 236:8 that specific language is unnecessary. It is sufficient now to conclude that the Legislature has in the past and continues to embrace the concept of selling Sweepstakes tickets at certain rest areas on limited access facilities notwithstanding RSA 236:8.

Further evidence of legislative intent appears in the form of notes in the file of the House Appropriations Committee, which considered the proposed legislation as House Bill 218. The notes indicate that the legislation was considered in light of revenue projections based upon sales at additional roadside "way stations", and therefore indicate awareness of what the sponsors understood the language to mean.

For these reasons, we conclude that the Legislature intended that the Commission have the power to include highway rest areas among the locations "designated" under RSA 284:21-h, II (d) (supp).

The second limitation to be considered is that imposed under federal law with respect to highway rights-of-way which are part of the Federal Aid System and have had federal monies expended in their construction, maintenance, or improvement.

With respect to such limitations under federal law, we have requested the position of Federal Highway Administration on the subject, since that agency would have the primary responsibility for administering the applicable laws and regulations. That position has been stated by Mr. Robert E. Kirby, Regional Federal Highway Administrator, in response to the inquiry made in our behalf by Mr. F. T. Comstock, Jr., Division Engineer. We quote from Mr. Kirby's

memorandum as reported to us by Mr. Comstock.

Section 111 of Title 23, United States Code, specifically prohibits 'automotive service stations or other commercial establishments servicing motor vehicle users' on rights of way of the Interstate system.

In addition, §1.23(b) of Title 23, Code of Federal Regulations, requires that all real property within the right of way of Federal-aid highways be used exclusively for highway purposes.

Section 1.23(c) of 23 CFR, however, permits exceptions to 1.23(b) by providing, subject to the provisions of 23 USC §111, that right of way may be used for nonhighway purposes if it is determined that such use 'is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic.'

The current FHWA directive applicable to the use of safety rest areas is PPM 90-3, subject: Landscape and Roadside Development, dated April 10, 1973. All other directives on the subject were revoked by FHWA Revocation Notice dated July 26, 1972.

Paragraph 6a(14)(b)5 provides in part that in safety rest areas and information centers, with the exception of public telephones, all services must be provided without charge, and '(a)ll commercial facilities making direct sales to the traveling public, including vending machines, are prohibited.' Although this provision applies only to agreements with private operators, it can reasonably be assumed that it is an expression of policy applicable to all rest areas and information centers, whether operated directly by the State with its own forces, or contracted to private operators.

On the Interstate system, however, unless it can be considered a noncommercial activity, the sale of lottery tickets cannot be permitted under any circumstances. Such sales, even though conducted by the State for the purpose of raising revenue, are a commercial activity.

August 1, 1974

It is not the same as taxation, which admittedly is a governmental, rather than a commercial activity, even though the ultimate use of the net proceeds may be the same, viz., to fund the State Treasury.

In summary you are advised as follows:

1. The sale of sweepstakes tickets in safety rest areas or information centers on the Interstate is a commercial activity prohibited by 23 USC §111.
2. The sale of such items on all other Federal-aid systems is a nonhighway activity which is unauthorized, unless approved under the provisions of 23 CFR §1.23(c). In order to approve such use, however, it is necessary to find that it is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon.

We have been advised by Mr. Comstock's office that the above restrictions do not apply to those sections of highway on which no federal funds have been spent, notwithstanding that a particular section may have been designated as part of the Federal-Aid System, and thus made eligible for federal aid. We are further informed by you and by the Department of Public Works and Highways that the section of highway known as the Central New Hampshire Turnpike Connection, built pursuant to RSA 257-A, and the rest area associated therewith, although currently part of the Federal-Aid System, has never been the subject of federal aid in any form. Assuming the accuracy of that relation, we conclude that Sweepstakes tickets may be sold at the Nashua rest area, so-called; however, we would suggest that Mr. Comstock be asked to ascertain the status of the Nashua rest area as the federal government understands it to be, so that there may be a consensus before any action is taken.

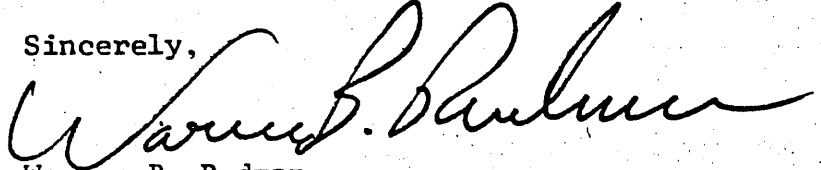
Mr. Powers

- 6 -

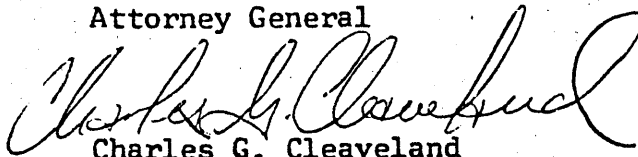
July 31, 1974

The sale of tickets within the right-of-way of any highway which has received federal aid would be permitted only upon a finding by the appropriate federal agency that "it is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic".

Sincerely,

A handwritten signature in cursive script, appearing to read "Warren B. Rudman".

Warren B. Rudman
Attorney General

A handwritten signature in cursive script, appearing to read "Charles G. Cleaveland".

Charles G. Cleaveland
Assistant Attorney General

CGC/tlr